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No. 87-1277

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

VS.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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On June 27, 1988, respondent Nelson filed his brief on the merits in the above-styled case. Petitioner Lockhart wishes to reply to Nelson's brief.

A. "WHAT ALL ARKANSAS CRIMINAL PRACTITIONERS KNOW"

Subsection C of Nelson's brief contains the following assertions of opinion: (1) the prosecuting attorney who represented the state of Arkansas at Nelson's sentencing hearing in Union County Circuit Court was so lazy that an unjust result occurred; (2) the Attorney General's Office, which represented the state of Arkansas in this case on direct appeal and at the post-conviction level, was so lazy that an unjust result occurred; and (3) the criminal justice system in Arkansas usually elevates form over substance. Petitioner Lockhart submits that these insulting *ad hominen* remarks are gratuitous and inappropriate, to say the least, and will not

assist this Court in resolving the former jeopardy issue at hand. Taken as a whole, these malicious asides are an excellent example of the "pound-the-law; pound-the-facts; if neither, pound-the-table" jest passed along to all first year law students. Lockhart urges this Court to treat Nelson's outburst as mere table pounding. If Nelson's fulminations amount to anything of substance, they are a declaration that the criminal justice system ought not to be adversarial in nature, if the accused is overmatched by the state. Not only does this argument have nothing to do with the former jeopardy issue before this Court, but this Court has emphatically rejected the "sporting contest" theory of criminal justice. *See Morris v. Slappy*, 461 U.S. 1, 15 (1983).

B. WHETHER TRIAL ERROR OCCURRED

Below, the Eighth Circuit Court of Appeals felt that no *Burks*-type trial error occurred. According to the Eighth Circuit, no trial error occurred because the state trial court did not make an express ruling on the admissibility of the prior conviction at issue. (*See* app. to Lockhart's *cert.* petition at A-6.) Before this Court, Nelson does not advance this argument — instead, he argues that no trial error occurred because the prior conviction at issue was not "evidence." Nelson contends that because the prior conviction had no existence as a matter of law, it had no existence as a matter of fact and could not, therefore, have been evidence. This Court need not delve into metaphysics in order to resolve this seeming existential crisis: the law has long recognized the distinction between *de facto* and *de jure*. For example, corporations that exist only in fact, as opposed to those corporations that are lawfully incorporated, may enforce contracts and may be the victims of crime, *see* 8 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§3759-62, 3862, 3888 (rev. perm. ed. 1982); a public office may be filled on a *de facto* basis, *see United States v. Royer*, 268 U.S. 394 (1925); and the judgments of a court that had only a *de facto*, as opposed to a *de jure*, existence are not

subject to collateral attack on that basis, *see Tumbs v. State*, 290 Ark. 214, 718 S.W.2d 105 (1986) and 21 C.J.S. *Courts* §146 (1940). Nelson is simply wrong when he asserts that legal inadmissibility is the equivalent of factual non-existence. The prior conviction at issue existed as a matter of historical fact. It had a tangible form as a piece of paper, a commitment order, memorializing the historical fact of Nelson's conviction of assault with intent to commit rape on March 25, 1960, in the Union County Circuit Court, Union County, Arkansas. (*See* J.A. at 5.) Nelson's argument ignores what actually happened at trial. Rather than acknowledge that, as a matter of fact, the jury *did* consider the prior conviction at issue, Nelson attempts to elevate a theoretical form over the historical substance of this case.[1] *See generally* 1 J. Wigmore, *Evidence in Trials at Common Law* §1 (Tillers rev. ed. 1983) (at least three meanings may be attributed to the term "evidence": (1) the existence of certain facts; (2) the process by which the existence of an unknown fact may be inferred from a known fact; and (3) the body of law that governs whether the fact finder will be allowed to consider a proffered fact).

C. WHETHER PROSECUTING ATTORNEYS WILL OVERTRY CASES

Nelson argues that prosecuting attorneys will not overtry cases if they cannot rely on the correctness of the trial courts' rulings on the admissibility of evidence. According to Nelson, this matter is rather straightforward: prosecuting attorneys present their "best" case and, in so doing, do not present evidence that is "cumulative." According to Nelson, a prosecutor's "best" case is one built upon *all* the evidence that is not cumulative. Nelson's conception of the prosecutor's task is too simple by far. Nelson fails to grasp "what all criminal

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[1]In this regard, perhaps Nelson's counsel has practiced too long in the Arkansas criminal justice system. *See* Nelson's brief at 29 n.12.

practitioners know": evidentiary facts vary in degrees of persuasive force and in degrees of probability of admission into evidence. Prosecutors in criminal cases cannot marshal their facts without considering the persuasive force and the probability of admission for each fact of itself and also in relation to the other facts that they have to place before the fact finder. In assessing the relative value of each fact, a prosecutor must consider whether other, more persuasive, facts are likely to be admitted into evidence; therefore, a fact is "cumulative" only if other, more persuasive, facts have already been admitted into evidence. For this reason, prosecutors will overtry their cases by proffering all the facts at their command if appellate courts can reverse trial court evidentiary rulings and then disregard the evidence that has just been held to be inadmissible in evaluating the sufficiency of the prosecutors' remaining facts. If all courts follow the Eighth Circuit's reasoning, no evidence, when proffered by the prosecutor at trial, could ever definitely be said to be cumulative.

Moreover, Nelson's conception of the way in which prosecutors assemble their proof — all the facts is the equivalent of the "best" case — is at odds with a corollary of this Court's "trial error" holding in *Burks v. United States*, 437 U.S. 1 (1978): where an appellate court decides that "trial error" occurred at trial, the prosecuting attorney is allowed to gather new evidence to replace the evidence that was held on appeal to be inadmissible. *See United States v. Holzer*, 840 F.2d 1343, 1349 (7th Cir. 1988) and Westen and Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 166 n.362 (1979). If the prosecutor has already presented his or her "best" case by presenting all of the facts, it is pointless to permit the prosecutor to attempt to gather replacement evidence. In this regard, *Burks* is a definite statement of this Court's belief that prosecuting attorneys do not present a case by proffering to the trial court, for its consideration and rulings, *all* the facts at their command.

D. WHETHER APPELLATE COURTS SHOULD CONSIDER ALL OF THE STATE'S EVIDENCE

In the argument section of his brief on the merits, Lockhart argues that an appellate court, in evaluating the sufficiency of the state's proof of the defendant's guilt, should consider evidence that it may have ruled to be inadmissible as well as the state's evidence that was properly admitted. This Court's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. ___, 106 S. Ct. 2616, 2627 n.17, 91 L.Ed.2d 364, 381-82 n.17 (1986) suggests that Lockhart's argument is correct. In *Kuhlmann*, a plurality of this Court stated that a prisoner held in state custody may be allowed to file a successive petition seeking habeas corpus relief pursuant to 28 U.S.C. §2254 if he can make a "colorable showing of innocence." According to the plurality, in making a colorable showing of innocence a habeas corpus petitioner must make his or her showing in the face of the evidence that was properly admitted against him and in the face of evidence that was unlawfully admitted, if this evidence is probative. The plurality's emphasis in *Kuhlmann* on the petitioner's actual guilt, as measured by *all* the evidence, suggests, albeit remotely, that an appellate court should consider the state's entire case, properly admitted evidence as well as improperly admitted, in determining whether the state put before the fact finder sufficient evidence of the defendant's guilt. *Cf. Webster v. Duckworth*, 767 F.2d 1206, 1215 (7th Cir. 1985) (the sufficiency of the state's proof of the defendant's guilt should be evaluated on appeal on the basis of the evidence that the state proffered to the trial court, not on the basis of the evidence that the trial court actually admitted); *Hunter v. State*, 257 Ga. 571, 574, 361 S.E.2d 787, 789 (1987) (same); *Webster v. State*, 274 Ind. 668, 413 N.E.2d 898 (1980) (same); Westen and Drubel, *Toward a General Theory*, *supra*, at 165-66 (same); and Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 371-72 (1964) (same).

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Nelson has a Fourteenth and Fifth Amendment former jeopardy right not to be resentenced as an habitual offender, given the facts of this case, is an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court hold that respondent Nelson does not have a former jeopardy right, given the facts of this case, not to be resentenced as an habitual offender.

Respectfully submitted,

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